

PATENT

**UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant: Erik E. EMSTAD et al.

Confirmation No.: 3659

Serial No.: 10/726,329

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Patent No.: 7,641,659

Issue Date: January 5, 2010

Docket No.: 1292.1228101

Customer No.: 28075

Title: SPINAL ACCESS INSTRUMENT

**STATEMENT OF FACTS REGARDING PATENT TERM ADJUSTMENT  
RECALCULATION IN VIEW OF WYETH**

Commissioner for Patents

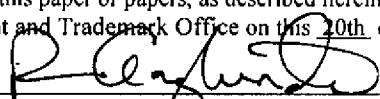
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**CERTIFICATE FOR ELECTRONIC TRANSMISSION:**

The undersigned hereby certifies that this paper or papers, as described herein, are being electronically transmitted to the U.S. Patent and Trademark Office on this 20th day of May, 2010.

By \_\_\_\_\_



Rachel Gagliardi

Dear Sir:

This Statement is submitted in support of the Request for reconsideration of Patent Term Adjustment Recalculation in view of Wyeth.

(i) The correct patent term adjustment is 1686 days. Applicants seek adjustment based on 37 C.F.R. §§ 1.702(a)(2), 1.702(b), and 1.704(b). PAIR lists two separate instances of PTO delay. The first delay, 667 days for a delay under § 1.702(a)(1), is correct. The second delay, under § 1.702(b), is incorrectly calculated at 1001 days. PAIR does not list Applicant's delay of 30 days under § 1.704(b), or the PTO delay of 10 days under § 1.702(a)(2). The total PTA, calculated at 1576 days, is thus incorrect.

(ii) The relevant dates for which an adjustment is sought are the filing date of a Notice of Appeal on November 7, 2008, the mailing of a non-final rejection on March 17, 2009, the actual filing date of December 1, 2003, and the issue date of January 5, 2010.

(iii) Circumstances during the prosecution of the application resulting in the patent that constitute a failure to take certain actions within specified time frames as set forth in §1.702(a)(2) include the following. Applicants filed a Notice of Appeal and request for pre-appeal conference on November 7, 2008, setting a four month response time by the USPTO of

March 7, 2009. A non-final rejection was mailed on March 17, 2009, resulting in 10 days of delay. No PTO delay is listed in PAIR for the mailing of the non-final rejection later than four months after the date on which the reply was filed.

(iv) Circumstances during the prosecution of the application resulting in the patent that constitute a failure to issue a patent within three years of the actual filing date of the application as set forth in § 1.702(b) include the following. The application was filed on December 1, 2003 and was issued on January 5, 2010, resulting in a delay of 1131 days beyond the 3 year time limit imposed by § 1.702(b). No Request for Continued Examination (RCE) or Appeal Brief was filed, and no delays were requested by the applicant. The 1001 day PTO delay listed in PAIR for the PTA 36 Months delay is thus incorrect.

(v) Circumstances during the prosecution of the application resulting in the patent that constitute a failure to engage in reasonable efforts to conclude processing or examination of an application for the cumulative total of any periods of time in excess of three months that are taken to reply to any notice or action by the Office making any rejection as set forth in §1.704(b) include the following. A final rejection was mailed July 8, 2008, setting a three month time limit for Applicant's response. A Notice of Appeal, request for pre-appeal conference, and request for extension of time were filed on November 7, 2008, resulting in 30 days of Applicant delay. No Applicant delay is listed in PAIR for the filing of this response after the three-month period. PAIR does correctly list Applicant's delay of 92 days for filing a response on September 26, 2007 in response to the non-final action mailed March 26, 2007.

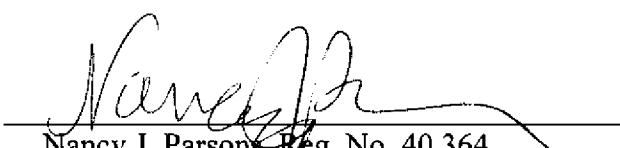
Applicants respectfully request the Patent Term Adjustment be recalculated at 1686 days, reflecting the PTO delays of 667 days for issuing a first notification under 35 USC § 132 later than 14 months after filing, 10 days for responding to a reply under 35 USC § 132 later than four months from the date the reply was filed, and 1131 days for issuing the patent later than three years from the filing date, and reflecting the two separate instances of Applicant delay of 30 days and 92 days for filing responses after the three-month period.

If a telephone conference might be of assistance, please contact the undersigned attorney at (612) 677-9050.

Respectfully submitted,

Erik E. EMSTAD et al.  
By their attorney,

Date: 5/20/10

  
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